

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1211

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

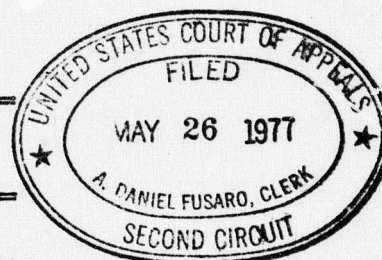
-against-

VICTOR DELEON,

Defendant-Appellant.

B
pps
Docket No. 77-1211

BRIEF FOR APPELLANT



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Defendant-Appellant.
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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the officer lacked probable cause to arrest and search appellant DeLeon, where Mr. DeLeon did not fit the description provided and was not identified by the accompanying complainant and where the information upon which the officer acted was only an uncorroborated allegation that a bill displayed was counterfeit.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lloyd F. MacMahon, U.S.D.J.) entered on March 30, 1977, convicting appellant Victor DeLeon, upon his plea of guilty, of possessing and attempting to pass counterfeit Federal Reserve notes with intent to defraud (18 U.S.C. §472) and of dealing in counterfeit Federal Reserve notes with the intent that they be passed as genuine (18 U.S.C. §473). Appellant DeLeon was sentenced as a young adult offender pursuant to 18 U.S.C. §5010(a) and 18 U.S.C. §4216 (formerly §4209); imposition of sentence was suspended and appellant DeLeon was placed on probation for two years.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Victor DeLeon, appellant herein, and Victor Matos were jointly indicted* for possessing and attempting to pass counterfeit Federal Reserve notes with intent to defraud (18 U.S.C.

*The indictment is B to the separate appendix to appellant's brief.

§472) and for dealing in counterfeit Federal Reserve notes with the intent that they be passed as genuine (18 U.S.C. §473). Mr. DeLeon alone proceeded to a hearing on his motion to suppress counterfeit bills seized by a New York City police officer during a search of Mr. DeLeon's person. The suppression hearing was conducted on March 1, 1977, before The Honorable Lloyd F. MacMahon, U.S.D.J. Judge MacMahon denied the motion in an oral opinion rendered after the hearing on March 1 and in a written memorandum filed March 14.*

Mr. DeLeon entered a plea of guilty on March 1, after the denial of his motion to suppress, reserving his right to appeal the denial of his suppression motion upon the consent of the Government, pursuant to procedures recognized by this Court (see United States v. Pond, 523 F.2d 210, 212 (2d Cir. 1975); United States v. Faruolo, 506 F.2d 490, 491 n.2 (2d Cir. 1974)).

A. The Hearing on the Motion to Suppress

Louis Sommella, a New York City police officer assigned to plainclothes duty in a taxicab on December 10, 1976, received a radio message that two Hispanic males had tried to pass a counterfeit bill, and he proceeded to a store at 2659 Broadway (H.6-8**).

*The text of Judge MacMahon's oral opinion is reproduced at C of the separate appendix to appellant's brief; the memorandum decision is Appendix D.

**References to pages of the transcript of the suppression hearing are shown as numerals preceded by "H".

George Morales, the store manager, told Officer Sommella that two men had entered the store and attempted to make a purchase with a bill which did not appear to him to be legitimate. Mr. Morales provided Officer Sommella with a brief description of the two men, but the officer was unable to recall any details of that description (H.8, 19). He did recall that Mr. Morales indicated that the two men left the store and entered a blue Plymouth Roadrunner with a white racing stripe and a highly raised rear section (H.8). Officer Sommella, his brother officers Abdul-Rahim and Tennant, and Mr. Morales entered the police taxicab and drove down Broadway searching for the blue car (H.9, 21-22).

A blue car fitting the description Mr. Morales had given was sighted at approximately 91st Street and Broadway, ten blocks south of Mr. Morales' store; after the sole passenger disembarked, the car continued slowly in the curb lane. Mr. Morales identified the car and, as the police officers pulled their car in front of the blue car, which had come to a stop between 89th and 90th Streets on Broadway, Mr. Morales ducked behind the front seat (H.9-10, 30). Officer Sommella and Officer Tennant exited the taxicab and walked to the blue car with guns drawn. Officer Sommella, observing Mr. DeLeon seated in the driver's seat and alone in the car, identified himself as a police officer and ordered Mr. DeLeon out of the car. The officer noted that Mr. DeLeon appeared "reluctant" to comply; he observed that Mr. DeLeon "seemed to like put his hand back to like lock

the door so we couldn't get him out of the car," so Officer Sommella opened the door, "grabbed him by the arm and pulled him out of the car" (H.10-12, 22-24).

Officer Sommella placed Mr. DeLeon against the car and conducted what he called a "frisk":

I patted him down on both sides. Then I found a large bulk in his left-hand pocket and I went into his pocket to investigate, and I found a roll of United States currency.

. . .

[The officer recovered \$157.83.] They were mostly 20's, 10's, 5's and singles.

. . .

It appeared to be genuine to me.

. . .

Because of the information that Mr. Morales gave us, I felt that he could have been one of the suspects involved in the scheme in this store, so I continued my search further and went into his right-hand coat pocket and came out with what I believe to be counterfeit money.

(H.12-13).

Explaining the search of Mr. DeLeon's left jacket pocket, from which was retrieved \$157.83 in genuine currency, Officer Sommella stated: "When I felt it on the outside, I thought it was a weapon, yes" (H.25-26). The record does not indicate whether Officer Sommella reached a similar conclusion with regard to the counterfeit bills in Mr. DeLeon's right jacket pocket, for he stated that "when I was patting the other side, then I went into his pockets and I found this here counterfeit

money" (H.26). The counterfeit bills consisted of three 50's and six 20's (H.13).

Immediately after he discovered the counterfeit bills, Officer Sommella placed Mr. DeLeon under arrest (H.14-15). Mr. Morales had not been asked to identify the occupants of the blue car prior to the arrest and search conducted by Officer Sommella. However, when he was asked to make an identification at the station house, he said that he had never seen Mr. DeLeon before (H.28).*

At the hearing, George Morales provided a few background details. At 7:00 p.m. on December 10, 1976, a man attempted to purchase a cologne and aftershave set costing \$8.10 with a \$50 bill which Mr. Morales believed was counterfeit. Mr. Morales refused to accept the bill, and the man took it back and left the store (H.37-38). Mr. Morales observed the man as he walked toward a liquor store up the block, where he met a friend. The two men then returned to Mr. Morales' store. The second man told Mr. Morales "that the bill was good, that he had just finished getting his check cashed in a cashier." Mr. Morales insisted that the bill was not legitimate and the two men left, taking the \$50-bill with them (H.38-39, 52). The men were seen entering a Plymouth Roadrunner, blue with a white stripe, driven by a third man whom Mr. Morales could not see (H.44, 51).

*The other man, who was not in the car and who was separately arrested by Officer Tennant, was identified by Mr. Morales at the station house as one of the two men who had entered his store (H.31).

The description of the two men that Mr. Morales later gave the police was: "[O]ne had a black cashmere about 5,2, 5,4, age 19 or 18. The other one had a brown coat. He was medium built. He was about 5,8, 5,9 ..." (H.43. No mention was made that the two men appeared Hispanic (H.43). Mr. DeLeon was definitely not one of the two men who entered Mr. Morales' store (H.48). Mr. DeLeon was not shown to fit the description given of either of the two men; the record contains only Officer Sommella's statement that Mr. DeLeon was wearing "I think a green leather or black leather jacket, a dark leather type of jacket" (H.25).

B. The Decision on the Motion to Suppress

At the conclusion of the testimony, the court below, without hearing argument, denied the motion to suppress. In this decision, which is set forth in its entirety as Appendix C, the court expressed the following conclusions:

[O]n the basis of that description, and on the basis of the time factor which was estimated by Officer Sommella to be about five minutes from the time that they got the description to the time they apprehended the defendants and searched the defendants, on the basis of those facts alone, any reasonably prudent police officer would conclude that a crime had been committed and that these were the people who committed it, and that these suspicions were confirmed I think is made clear by the search, but we don't judge the legality of the search by what was discovered, but, rather, what happened before which would lead a reasonably prudent police officer to conclude that a crime had

been committed and that these were the people who committed it.

(H.55-56).*

Because Mr. DeLeon reserved his right to appeal the denial of his motion to suppress the seized bills, the court also issued a written memorandum (Appendix D) expressing its findings and conclusions. Included in this opinion were the following remarks:

On the basis of the facts described above, we conclude that the information known to Officer Sommella was "sufficient to warrant a prudent man in believing that [defendant] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). The particular information supporting this conclusion was (a) the belief of Morales and Martinez, both retail store clerks handling currency continually, that the tendered fifty-dollar bill was not genuine; (b) the accurate description of the Roadrunner which defendant drove away, which was different from any automobile the officer had seen in his precinct before or since this incident; (c) the location and direction of travel of the Roadrunner when first seen by the officer, which corroborated Morales' story; and (d) the Hispanic features of defendant, which

*In the colloquy which succeeded the court's decision, counsel argued: (1) there were insufficient data to support probable cause to believe that a crime had been committed by the two men because Mr. Morales offered only his suspicion that the bill -- which was not available for independent police inspection -- was counterfeit, and was not able to attribute knowledge of the counterfeit nature of the bill to the two men; (2) probable cause to search Mr. DeLeon was lacking because his appearance did not match the description of the two men who had attempted to pass the counterfeit bill and his identity was not confirmed prior to the search, even though Mr. Morales was present (H.57-59). The court found no merit in these arguments and opined that the motion was "frivolous" (H.62).

fit comfortably within the description given by Morales.

Even though defendant may not have been one of the individual[s] Morales saw in his store, the officers were justified in stopping a man of defendant's appearance driving or riding in the distinctive automobile described by Morales. There is no evidence that the officers had reason to know that defendant was not one of the two who had gone into the store. Although Morales was with the officers, he was crouched on the floor of the police taxi and did not see the man Sommella had pulled out of the car. The officers knew that at least the other man had already exited the car. Finally, the exigent circumstances presented by a suspect sitting in a running automobile, capable of immediate and dangerous flight, clearly justified the officers' quick response without taking the time to obtain Morales' positive identification.

Under this set of facts, the search of defendant is warranted as a search incident to arrest, even if the arrest did not formally take place until after the search and seizure. United States v. Jenkins, 496 F.2d 57, 73 (2d Cir. 1974); United States v. Riggs, 474 F.2d 699, 704 (2d Cir.), cert. denied, 414 U.S. 820 (1973).

In any event, Sommella was justified in making at least an investigatory stop and frisk of defendant, in order to maintain the status quo, under the lower standards of suspicion required for such a stop. See N.Y. Crim.Proc.Law §140.50 (McKinney 1976 Supp.); Terry v. Ohio, 392 U.S. 1 (1968); United States v. Gonzales, 362 F.Supp. 415 (S.D.N.Y. 1973). Sommella's subsequent discovery of several bills bearing the same serial numbers would then have justified a full arrest. United States v. Vigo, 487 F.2d 295, 298 (2d Cir. 1973); United States v. Del Toro, 464 F.2d 520 (2d Cir. 1972).

(Appendix D at 6-8).

ARGUMENT

THE OFFICER LACKED PROBABLE CAUSE TO ARREST AND SEARCH APPELLANT DeLEON, WHERE MR. DeLEON DID NOT FIT THE DESCRIPTION PROVIDED AND WAS NOT IDENTIFIED BY THE ACCOMPANYING COMPLAINANT AND WHERE THE INFORMATION UPON WHICH THE OFFICER ACTED WAS ONLY AN UNCORROBORATED ALLEGATION THAT A BILL DISPLAYED WAS COUNTERFEIT.

When Officer Sommella, displaying his weapon, "grabbed [Mr. DeLeon] by the arm and pulled him out of the car," he had effected an arrest; and when the officer rummaged freely in Mr. DeLeon's pockets "[b]ecause of the information that Mr. Morales gave us," he was conducting a full-fledged search. These actions were not supported by the requisite probable cause. Mr. DeLeon did not fit the description provided by Mr. Morales and was not identified by Mr. Morales, who was present; and the information upon which Officer Sommella acted was only an uncorroborated allegation that a bill displayed to Mr. Morales had appeared to be counterfeit. Consequently, the arrest and the search were illegal, and the seized counterfeit bills should have been suppressed.

A. Officer Sommella conducted a full arrest and search, not a limited inquiry and frisk; therefore, the probable cause standard applies.

Officer Sommella did not conduct a limited frisk of Mr.

DeLeon (see Terry v. Ohio, 392 U.S. 1, 20-22, (1968)), but freely entered Mr. DeLeon's pockets to retrieve several counterfeit bills (see Sibron v. New York, 392 U.S. 40, 65-66 (1968)). Moreover, his actions were incident not to a mere stop, but to an arrest.* Therefore, the probable cause standard applies (see Sibron v. New York, supra; Gerstein v. Pugh, 420 U.S. 103, 111 (1975)).

Though Officer Sommella described his initial actions as a "pat down," he did not suggest that his discovery of the counterfeit bills resulted from this limited intrusion. His pat down yielded him a roll of genuine bills which the officer had, incredibly, believed to be a weapon (cf. Tinney v. Wilson, 408 F.2d 912, 916 (9th Cir. 1969)). But Officer Somella did not allege that the nine counterfeit bills felt like a weapon, and certainly the discovery of the genuine bills created no cause for a further search. The officer's own words define the true character of his intrusion:

*Because what occurred here was not a frisk, but a true search, the penultimate paragraph of Judge MacMahon's opinion (Appendix D) is not pertinent. However, on this record, even a frisk was unjustified, for the officers had no reasonable suspicion based on articulable facts that Mr. DeLeon was armed and dangerous, and Officer Sommella did not claim to have any such fear. The absence of such testimony, as well as the passive conduct exhibited by the other two suspects in Mr. Morales' store and the non-violent nature of the crime under investigation make a frisk improper. See Sibron v. New York, supra, 392 U.S. at 64; United States v. Thorpe, 526 F.2d 326, 328-329 (5th Cir. 1976); United States v. Coates, 495 F.2d 160, 165 (D.C. Cir. 1974); United States v. Davis, 441 F.2d 28, 29 (9th Cir. 1971); cf. Adams v. Williams, 407 U.S. 143, 146 (1972).

... I continued my search further and went into his right-hand coat pocket and came out with what I believe to be counterfeit money.

(H.13).

Similar actions were recognized as a full search in Sibron v. New York, supra, 392 U.S. at 65, and, absent probable cause, these actions are unlawful.

Equally, the officer did not merely stop Mr. DeLeon, but arrested him. Though Officer Sommella asserted that he arrested Mr. DeLeon after discovering the counterfeit bills, his conduct reveals a forcible and substantial restraint of liberty before that discovery, and his delay in announcing the arrest does not alter the fact that it was effected before the search. Sibron v. New York (Peters v. New York), 392 U.S. 40, 67 (1968); Henry v. United States, 361 U.S. 98, 103 (1959); Bailey v. United States, 389 F.2d 305, 308 (D.C. Cir. 1967). Here, Officer Sommella blocked the path of the blue Plymouth, rushed toward Mr. DeLeon with his gun drawn, and proceeded to pull him from his car. In United States ex rel. Walls v. Mancusi, 406 F.2d 505, 508-509 (2d Cir.), cert. denied, 395 U.S. 958 (1969), this Court recognized less forcible conduct to be an arrest: "In the instant case the arrest, for purposes of constitutional justification, occurred at the moment Officer Johnson ordered relator out of the truck at gunpoint." Under the facts presented at bar, Mr. DeLeon was arrested at the outset, well before any search was made, and, absent probable cause,

this arrest was unlawful.

Whether this search is viewed as an exploratory search for contraband or as a search incident to arrest, the necessary standard by which the officer's conduct must be measured is probable cause. Absent probable cause to arrest or search, the officer's seizure would be unlawful.

B. Officer Sommella lacked probable cause to arrest and search Mr. DeLeon, and the evidence seized was illegally obtained.

Probable cause exists if, "at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964); see Brinegar v. United States, 338 U.S. 160, 175-176 (1949); Carroll v. United States, 267 U.S. 132, 162 (1929); see also Draper v. United States, 358 U.S. 307, 312-313 (1959). The information upon which Officer Sommella acted falls short of probable cause. An examination of the facts found by the court below to support probable cause, and a consideration of several significant facts not addressed by the court below, demonstrate the absence of probable cause.

1. The facts found by the court below.

The court's finding of probable cause was based on the following four facts:

(a) the belief of Morales and Martinez, both retail store clerks handling currency continually, that the tendered fifty-dollar bill was not genuine; (b) the accurate description of the Roadrunner which defendant drove away, which was different from any automobile the officer had seen in his precinct before or since this incident; (c) the location and direction of travel of the Roadrunner when first seen by the officer, which corroborated Morales' story; and (d) the Hispanic features of defendant, which fit comfortably within the description given by Morales.

(Appendix D at 6-7).

The expertise of Mr. Morales and his assistant, who did not testify, is not a matter of record; no evidence was presented concerning the extent of Mr. Morales' retail business experience, and no proof rebuts the possibility that he had never before seen a \$50 bill. Moreover, Mr. Morales did not detail in his testimony any of the faults in the bill that led him to conclude it was counterfeit. Thus, contrary to the court's first finding, the opinion expressed by Mr. Morales and his assistant was not shown to be so accurate and reliable as to give the officer probable cause to believe that the bill was counterfeit. An officer's own examination of a counterfeit bill provides a direct and expert observation which is inherently reliable (see United States v. Blum, 432 F.2d 250, 252 (9th Cir. 1970)); though such corroboration was not possible

here because the bill was not passed, the untrained opinion of Mr. Morales was not an adequate substitute, and was no more than an accusation which authorized investigation.*

Mr. Morales' accurate description of the blue Plymouth and its direction of travel (the court's second and third factors) allowed the officers to find the automobile in which the two men had left, but it did not provide them with any basis for arresting the driver of the car. The automobile, which was driven by a third person rather than by either of the suspects, had not been seen waiting near the store in a suspicious fashion, and, as is apparent from the speed at which it was being driven, it was not functioning as a get-away car (cf. United States ex rel. Stanbridge v. Zelker, 514 F.2d 45, 52 (2d Cir. 1975)). Whatever suspicions were properly directed at the two passengers did not operate against the driver; the car was not shown to be an integral part of any criminal act, and Mr. Morales' information regarding the car, which may have served to direct the officers

*The fact that a citizen-informant is deemed reliable without satisfying the Aguilar-Spinelli test (Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1959)) does not obviate the need to corroborate his information when the question is not of the informant's truthfulness, but of his judgment and opinion. Citizen-informants are deemed reliable because they have no apparent motive to falsify (see, e.g., United States v. Rollins, 522 F.2d 160, 164 (2d Cir. 1975); United States v. Burke, 517 F.2d 377, 380 (2d Cir. 1975); United States v. Miley, 513 F.2d 1191, 1204 (2d Cir. 1975)); but regardless of Mr. Morales' honesty, his knowledge was not shown to have been adequate to guarantee the reliability of his information, and absent corroboration, his information did not provide the officers with probable cause (cf. United States v. Rueda, 549 F.2d 865, 870 (2d Cir. 1977)).

to the two suspects, did not establish probable cause to arrest the driver.*

The court's mention, as its fourth and final factor, of "the Hispanic features of defendant, which fit comfortably within the description given by Morales," suggests a misreading of the record. The court's recitation disregards the fact that Officer Sommella was unable to recall the description Mr. Morales had given him, and more significantly, Mr. Morales testified that he did not inform the officer that the suspects were of Hispanic origin (H.43, 44). Thus, the Hispanic features of Mr. DeLeon did not corroborate any information Officer Sommella received from Mr. Morales, and this factor, too, is not a sound basis for a finding of probable cause.

2. The facts not addressed by the court below

Several consequential facts and notable deficiencies in the evidence demonstrate the absence of probable cause. These were disregarded by the court below in its written decision.

First, Officer Sommella was provided with information inadequate to establish probable cause to believe that a crime had been committed. Mr. Morales' allegation that a customer

*The court below stated in its findings: "There is no evidence that the officer had reason to know that defendant was not one of the two who had gone into the store." To the contrary, the officer did have reason to know this: first, Mr. Morales had told him that the two men entered a car driven by a third person, which would have been Mr. DeLeon; second, the descriptions given by Mr. Morales of the two men did not comport with Mr. DeLeon's appearance.

had attempted to pay for a purchase with a counterfeit \$50 bill, in addition to being an uncorroborated and unreliable opinion (see Part 1, supra), offered no factual basis for concluding that the use of the bill had been criminal rather than accidental. In previous cases before this Court, probable cause to arrest one who has passed a counterfeit bill has been found when the surrounding circumstances are inconsistent with an accidental use of counterfeit money. See, e.g., United States v. Francolino, 367 F.2d 1013 (2d Cir. 1966), where the defendant had made multiple attempts to pass counterfeit bills in the same establishment; United States v. Ayers, 426 F.2d 524 (2d Cir. 1970), where the defendant, after passing the counterfeit bill, made a hurried exit without waiting for the change he was due. Here, by contrast, the individual returned to Mr. Morales' store with another man who indicated that the bill had just been obtained from a check cashier, thereby providing a claim of innocent possession and accidental use of the counterfeit bill. The actions of the two men, who neither coerced Mr. Morales nor acted in a culpable manner, were indicative of their belief that the bills were genuine and should have suggested to Officer Sommella that a mistake -- not a crime -- had occurred. This conclusion would have precluded an arrest and search, for as this Court noted in United States ex rel. McCullers v. McMann, 370 F.2d 757, 759 (2d Cir. 1967):

It is important that the police officers

knew that a felony had been committed. They were not proceeding merely on the basis of suspicious circumstances in which the appellant was found.

A second fact, not considered by the court below, was the failure of Officer Sommella to arrest someone who fit the descriptive information provided by Mr. Morales. Though Mr. Morales noted that the two suspects entered an automobile driven by a third man, Mr. DeLeon was accompanied by only one other man when Officer Sommella arrested him, and the officer did not contend that this second man fit either of the descriptions Mr. Morales had given him. Moreso, in arresting and searching Mr. DeLeon, the officer selected a man who unmistakably did not fit the description of either suspect: Mr. DeLeon was dressed in neither the black cashmere nor the brown coat the two suspects were seen to have been wearing -- he was dressed in a green or black leather jacket. Nor did Officer Sommella ask Mr. Morales, who was seated in the car and was later to maintain that he had never before seen Mr. DeLeon, whether he was able to identify Mr. DeLeon. While the arrest of the wrong person does not conclusively prove a lack of probable cause, it does constitute substantial evidence of an illegal arrest when the mistake is attributable to an indifference to distinctions between the person arrested and the person described. Such indifference is not equivalent to a "reasonable mistake." See Hill v. California, 401 U.S. 797, 802-804 (1971); United States ex rel. Kirby v. Sturges, 510

F.2d 397, 400-401 (7th Cir.) (Stevens, C.J.), cert. denied, 421 U.S. 1016 (1975).

A third fact which demonstrates the absence of probable cause is the lack of independent observation by Officer Som-mella which would confirm or augment Mr. Morales' limited information. The importance of this fact is apparent upon consideration of United States v. Olsen, 453 F.2d 612 (2d Cir.), cert. denied sub nom. Leach v. United States, 406 U.S. 927 (1972). There, a defendant, after conferring with two other defendants outside a bar, entered and requested change for what the bartender believed was a counterfeit bill. The bartender rejected the bill and called the police, who arrested the three defendants. In upholding the arrest, this Court directed its attention to three facts as requisites for its finding of probable cause:

[T]he information available to Officer Ross at the moment he made the arrests, if taken cumulatively, gave him a reasonable basis to believe that both appellants had participated in a crime. [Citation omitted.] He knew that both men had been with Olsen before his futile attempt to pass a counterfeit note to Alberti [the bartender], that they had awaited the outcome of this attempt, and then had rejoined Olsen. He knew that both men had minor arrest records, albeit for different crimes than the one of which he suspected them. Most tellingly in this context he observed the three appellants counting and exchanging money as he approached them. Each of these facts by itself would have been consistent with innocent behavior. No one by itself would have constituted probable cause to make the arrests. [Citations omitted.] But taken together in the context of this case, the

three factors were sufficient to justify an experienced and prudent police officer in acting on his conclusions.

(Id. at 615-616).

Officer Sommella did not know if Mr. DeLeon had been with either of the two persons who entered Mr. Morales store "before [their] futile attempt to pass a counterfeit note" (emphasis supplied); he did not know Mr. DeLeon from any "minor arrest record;" and he did not observe Mr. DeLeon "counting and exchanging money as he approached." Nor had Mr. DeLeon attempted to elude the police; he was arrested only ten blocks south of Mr. Morales' store and was driving at a rate of five miles per hour (cf. United States ex rel. Walls v. Mancusi, 406 F.2d 505, 508 (2d Cir.), cert. denied, 395 U.S. 958 (1969)). And the one act which led the officer to drag Mr. DeLeon from his car -- Mr. DeLeon's attempt to lock the car door as Officer Sommella approached him -- was entirely innocent in light of the officer's appearance and conduct: dressed in civilian clothes, exiting a taxicab, and waving a gun at Mr. DeLeon.*

The court's failure to consider these significant facts in assessing probable cause, with its reliance instead upon inconclusive facts, establishes that the court erred in denying Mr. DeLeon's motion to suppress.

*In any event, Mr. DeLeon's attempt to lock the door, coming after Officer Sommella's approach with drawn gun, was subsequent to the arrest (see United States ex rel. Walls v. Mancusi, supra, 406 F.2d at 508-509), and cannot justify that arrest.

CONCLUSION

For the foregoing reasons, the district court erred in denying appellant DeLeon's motion to suppress evidence seized subsequent to an illegal arrest; consequently, the judgment of the district court must be reversed and the indictment dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Harvey Lloyd Bennett

